



CVCWA

Central Valley Clean Water Association

Representing Over Fifty Wastewater Agencies

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April 14, 2011

Submitted Via Email to: deltaplancomment@deltacouncil.ca.gov

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Central Valley Clean Water Association Comments on the Second Staff Draft Delta Plan

Dear Chairman Isenberg and Council Members:

On behalf of the Central Valley Clean Water Association (CVCWA), we appreciate the opportunity to provide comments to the Second Staff Draft Delta Plan (Delta Plan). CVCWA is a nonprofit association of Publicly Owned Treatment Works (POTWs) throughout the Central Valley whose primary mission is to represent wastewater agencies in regulatory matters while balancing environmental and economic interests. Many of CVCWA's members will be directly impacted by the Delta Plan and have a significant interest in its development and implementation.

As a general matter, the Delta Plan needs to do a better job of distinguishing between policies, recommendations, and regulations. The line between general policies, specific recommendations, and other provisions that may or may not represent binding regulations is currently blurred and needs greater refinement and definition. Specifically, the Delta Plan should clarify that, if this is the intent of the Delta Stewardship Council (Council), the "policies" are considered legally enforceable regulations designed to implement the Delta legislation, while "recommendations" are the general goals that underlie those policies but do not have regulatory effect. In that regard, any legally enforceable policies should be clearly delineated and supported using best available science, where appropriate. The use of these "back door" regulatory policies allows the Council to hijack other State regulatory agencies' policies, rules and regulations which in many cases are already overly onerous and maddeningly duplicative. We believe the Council's

Plan should only coordinate efforts across state agencies, and not evolve into another regulatory body.

Further, CVCWA has many concerns with other specific provisions of the Delta Plan. Three areas of particular concern in the recently released Delta Plan are discussed herein. First, various provisions of Chapter 1 governing the Delta Plan itself require further elaboration and inclusion of important items that appear to be missing from this draft. Second, Chapter 6 addressing water quality appears to make improper presumptions and misidentifies certain obligations of dischargers under existing law. Finally, we have concerns regarding Chapter 9 addressing the financing mechanism for funding both the short-term and long-term actions under the Delta Plan, and particularly those provisions regarding the “stressors pay” approach.

CVCWA acknowledges that at this point in the process, the Council has requested specific language amendments and proposals rather than general comments. However, the incomplete nature of the draft documents and lack of clarity on policies and recommendations and jurisdictional authority makes this approach difficult. Our comments serve to identify larger issues, though to the extent that these comments address some of the same issues as the comment letter sent by the Sacramento Regional County Sanitation District (SRCSD) on April 5, 2011, we incorporate those specific suggestions for language modifications by reference. More specific comments on certain sections of the Delta Plan follow.

Chapter 1: The Delta Plan

The Delta Plan properly acknowledges that Water Code section 85057(b) exempts several actions from the definition of a “covered action” under the Delta Plan. However, these exemptions should be specifically identified and listed as part of the plan itself, not merely referenced as they are in the current draft. The inclusion of these statutory exemptions in the text of the Delta Plan would be useful to entities seeking to determine whether a contemplated action is exempt or not, and would be more in line with the intent of the Delta legislation. In addition, CVCWA is concerned that the definition and scope of covered actions under the Delta Plan remains somewhat ambiguous. As many of the Council members noted at the March 24-25, 2011 Council meeting, there is lingering confusion regarding what constitutes a “covered action” under the Delta Plan. By statute, in order to be defined as a covered action, an action must “occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.” (Wat. Code, § 85057.5.) However, the Delta Plan portrays this requirement as simply one element to consider when determining whether an action is a “covered action,” and uses this independent provision to establish a nexus to outside activities on a state-wide basis that affect the Delta ecosystem. Specifically, the Delta Plan indicates that when a covered action has a connection to an out-of-Delta action, the covered action’s proponent must evaluate whether the out-of-Delta action significantly contributes to the need for the covered action and whether the out-of-Delta action is consistent with the Delta Plan’s regulatory policies. (Delta Plan at p. 6, lines 20-25.) We encourage staff to include a more specific and articulate description of what types of activities

constitute a “covered action” at the local level as this concept as currently defined is unnecessarily ambiguous and will inevitably lead to dispute and ultimately failure of the Council and Plan.

Chapter 4: Manage Water Resources

Many of CVCWA’s member agencies engage in water recycling activities, and we appreciate that the Delta Plan acknowledges the importance of water recycling to achieving the co-equal goals specified in the legislation. Specifically, in Water Resource Policy P2, the Delta Plan notes that each region shall optimize the use of recycled water. (Delta Plan at p. 30, lines 23-28.) However, the Delta Plan should take the additional step of acknowledging and identifying the benefits of recycled water use, including reductions in water use, decreased reliance on other water resources, sustainability, and associated ecological benefits. In addition, the plan should support existing recycled water legislation by fostering an environment that embraces recycled water’s benefits without undue hardship of its approvals and use.

Chapter 6: Water Quality

CVCWA has a number of concerns with this section of the Delta Plan. In a general sense, we are concerned that as the Delta Plan develops, it will continue to rely on generalizations and contain broad conclusions that presume or imply that there is a general trend of water quality degradation rather than basing its conclusions, policies, and recommendations on the best available science. This remains to be seen as additional drafts are produced and specific policies are developed. More specifically, the language of Water Quality Policy 1 for Total Maximum Daily Loads (TMDLs) which specifies proponents of a covered action to “demonstrate full compliance with their Total Maximum Daily Load obligations” (Delta Plan at p. 37, lines 11-15) requires further revision. By including this policy in only one portion of the Delta Plan, staff has singled out dischargers and other entities affected by TMDL allocations while excluding similar provisions for other entities (i.e., those holding water rights permits are not required to demonstrate full compliance with water right permits when taking a covered action). Moreover, this provision may actually prevent some actions that could improve water quality, and improperly references TMDLs as the compliance mechanism for dischargers. In practice, wasteload allocations and load allocations are implemented in permits through effluent limitations and/or other permit provisions. TMDLs standing alone are typically not self-executing unless adopted as part of a Basin Plan’s program of implementation. This provision needs to be modified to more adequately reflect legal requirements governing dischargers, and the Council should consider the potential ramifications resulting from the overbreadth of this policy.

In addition, the Delta Plan needs to broaden recommended participation in the Central Valley Salinity Alternatives for Long Term Sustainability Program (CV-SALTS). As currently written, Water Quality Recommendation 4 states that only those who discharge flows to the Delta should participate in the CV-SALTS program. However, the export of water is a significant

source of salt that re-circulates through the San Joaquin River and it also reduces the ability of the system to remove salts from the valley, and therefore will have to be controlled to manage salts in the Central Valley. The resources required to complete the potential Basin Plan Amendment for salts and nutrients for the Central Valley will require all those who benefit from Delta water to contribute to the program, not only dischargers. This reality should be reflected in the Delta Plan. Finally, though not included in this draft, the Draft Findings on Water Quality (Findings) may serve as the foundation for policies and recommendations to be included in future drafts of the Delta Plan. These Findings require significant improvement and more detailed discussion, as noted in the March 28, 2011, comment letter from SRCSD. CVCWA incorporates the comments contained in that letter by reference and reiterates the concerns contained therein.

Chapter 9: Finance Plan

One of CVCWA's primary concerns is the proposed financing mechanism described in Chapter 9 of the Delta Plan. First and foremost, the proposed "stressors pay" approach represents an attempt to assess fees on entities that are already operating in compliance with permits and existing law and protecting beneficial uses. According to the Delta Plan, the guiding principles under which the financing plan will be developed are the "beneficiary pays" principle, which appears to cover the costs of infrastructure that leads to water supply reliability, and the "stressors pay" principle, which would assess fees on human activity that causes negative operational or environmental impacts to pay for mitigation costs. For one, this presumes a nexus that has not been demonstrated. There is not definitive science linking water quality changes to the Pelagic Organism Decline (POD) or to any other condition that impacts operation of the water projects. (Delta Plan at p. 48, lines 23-33.) One of the "stressor" fees being considered is a "water quality loading charge," which is defined as a plan to charge measured pollutant loads in water discharges. However, the "stressors pay" principle fails to recognize that those entities are governed by existing permits, and already pay significant sums to comply with those permits and meet applicable water quality standards. There is no reason to assess these punitive fees on entities already complying with all requirements mandated under the law. Any subsequent drafts should acknowledge that dischargers operating in compliance with their NPDES permits are meeting all relevant water quality standards and therefore should not be categorized as "stressors" for purposes of the proposed assessments.

Further, the term "stressor fees" fails to consider all those who benefit from and utilize the Delta. Any fees for the Delta must include not only those who discharge into the Delta, but also those who divert water from the Delta. The Delta Plan notes that the feasibility of utilizing "diversion fees" may be difficult because water users "adamantly oppose any new diversion fees." (Delta Plan at p. 56, lines 22-24.) Water diversions are clearly a stressor that can have a direct and negative impact on the health of the Delta ecosystem. The Delta Plan itself acknowledges the importance of this connection and the role of water diversion from the Delta as a significant stressor. Diverters must be assessed their proportionate share of any fees or

other revenue generators contemplated by the Delta Plan, despite any apprehensions regarding feasibility or the opposition from those on whom the fee will be assessed. These diversions are clearly a “stressor” that falls under this companion principle of “stressors” pay, and cannot be excused merely because there may be opposition from water users. That said, Central Valley communities should not bear a “double portion” of stressor fees.

Conclusion

We appreciate the opportunity to comment on the Second Staff Draft Delta Plan, and look forward to reviewing future drafts as the work of the Delta Stewardship Council progresses. CVCWA will continue to review subsequent versions of the Delta Plan and provide comments and more specific feedback as the Delta Plan becomes more detailed. If the Council or staff has any questions or concerns, please do not hesitate to contact me at (530) 268-1338.

Very truly yours,

A handwritten signature in cursive script that reads "Debbie Webster".

Debbie Webster

TAD:jm

cc: Pamela Creedon – Central Valley RWQCB
Stan Dean - SRCSD